



Commonwealth of Kentucky  
Finance and Administration Cabinet  
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**Steven L. Beshear**  
Governor

**Jonathan Miller**  
Secretary

July 30, 2010

**No. 10-18**

Richard D. Williams, III  
E&O Program Leader  
Williams Underwriting Group,  
a division of Maverick Insurance LLC.  
P.O. Box 1086  
New Albany, IN 47151

RE: Determination of Protest: RFB 758 1000000943 (Real Estate Licensee E&O Insurance).

Dear Mr. Williams:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the solicitation terms of RFB 758 1000000943 for Real Estate Licensee E&O Insurance (the "RFB"). In the protest you contend that the best value criteria of the RFB was designed to benefit the incumbent vendor. For the reasons stated herein, this protest is denied.

### **FACTUAL BACKGROUND**

The Finance Cabinet, Office of the Controller, Office of Procurement Services ("OPS") issued the RFB on May 25, 2009. The RFB sought bids for KREC licensee Errors and Omissions insurance. This procurement was conducted as a "competitive sealed bid" under 45A.080.

The RFB contained a number of mandatory requirements relating to policy terms and conditions and scope of services. RFB, A. Mandatory Minimum Requirements. (pp. 6 to 9). In other words, the bidder was required to satisfy these requirements in order to be a responsive bidder. The RFB also contained evaluated best value criteria. These best value criteria were evaluated on a 100 point basis as follows:

1. EXPERIENCE (30 points possible)

PRIOR EXPERIENCE (Mandatory Real Estate Errors and Omissions Coverage) of INSURER.  
Criteria will be evaluated based on number of years of experience the Insurer has in providing mandatory real estate E&O insurance. 10 POINTS POSSIBLE.

PRIOR EXPERIENCE (Mandatory Real Estate Errors and Omissions Coverage) of AGENT. Criteria will be evaluated based on number of years of experience the Agent has in claims handling relating to mandatory real estate E&O insurance. 10 POINTS POSSIBLE

Length of Relationship between Insurer and Agent. Criteria will be evaluated based on number of years the Agent has worked with Insurer in providing real estate E&O insurance. 10 POINTS POSSIBLE

## 2. LEVEL OF SUPPORT (5 Points Possible)

Level of Support — Servicing Agents. Criteria will be evaluated in terms of the number of servicing agents provided by Agent. 2.50 POINTS POSSIBLE

Level of Support — Attorneys. Criteria will be evaluated in terms of the number of attorneys included on list provided with bid. 2.50 POINTS POSSIBLE

## 3. PREMIUM (65 possible points)

RFB, Section B. Evaluated Requirements (pp. 9-11).

On June 1 2010, WUG filed a written protest to the RFB. On June 10, 2010, OPS filed a response to the protest.

## **DETERMINATION**

After a review of the solicitation, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet ("Secretary") finds and determines as follows:

Any prospective bidder may file a protest to the content of solicitation documents. KRS 45A.285(2). A party seeking to establish standing as a "prospective bidder" must show that it has a direct economic interest that will be impacted by the award of the contract or by the failure to award the contract. *See* 28 U.S.C. 1491 (b) (1). A prospective bidder has standing when it shows it had a substantial chance of obtaining the award. *Myers Investigative and Security Service, Inc .v. United States*, 275 F. 3d 1366, 1370 (Fed. Cir. 2002). WUG, by submitting a bid to the actual solicitation, has established that it was a "prospective bidder."

A protest to a solicitation must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. In this case, the RFB was issued on May 25, 2010. The written protest was received on June 1, 2010. The Secretary finds that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

A protest to the solicitation documents is directed at the contents of the solicitation, for example, the protest may concern an irregularity in the evaluation process apparent from the face of the solicitation document. This procurement was conducted as “competitive sealed bidding” under KRS 45A.080. The statutory scheme imposes certain requirements for RFBs. For example, the solicitation shall state that awards shall be made on the basis of best value. KRS 45A.080(2). “Best value” means a procurement in which the decision is based on the primary objective of meeting the specific business requirements and best interests of the Commonwealth. These decisions shall be based on objective and quantifiable criteria that shall include price and that have been communicated to the offerors as set forth in the invitation for bids. KRS 45A.070(3).

While the use of best value criteria is mandatory, the agency has discretion concerning the fashioning of the criteria. Discretionary determinations, such as the determination of the use of criteria, will be evaluated on an “arbitrary or capricious” standard, that is, the inquiry will be whether the agency’s determination is irrational. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

In its letter of protest, WUG asserts the best value RFB criteria were arbitrary, capricious, and contrary to law because the best value criteria were designed to benefit the incumbent vendor. WUG contends that the solicitation contained “elevated requirements” which had the effect of creating a sole source bid. As an initial matter, the RFB valued the bidder’s premium cost (*i.e.*, the cost of the policy) as 65 percent of the total best value points. The majority of best value points, therefore, were entirely competitive and objective. Nevertheless, WUG points to the following other criteria:

1. “Prior experience of the insurer in providing mandatory real estate errors and omissions only.”

This requirement constituted ten points or 10 per cent of the total score. Prior experience of the insurer in providing mandatory real estate Errors and Omissions policies is evidence which would suggest the ability to successfully and efficiently handle the mandatory Errors and Omissions insurance to be offered under the anticipated contract. The Secretary finds that this best value criterion is rational and not arbitrary or capricious. Accordingly, this ground of protest is without merit.

2. “Agents [sic] experience in handling claims.”

This requirement constituted ten points or 10 per cent of the total score. Agents’ prior experience in claims handling relating to mandatory real estate Errors & Omissions insurance is evidence which would suggest the ability to successfully and efficiently handle the Errors and Omissions insurance claims made under policies obtained by real estate licensees under the anticipated contract. The Secretary finds that this best value criterion is rational and not arbitrary or capricious. Accordingly, this ground of protest is without merit.



3. "Length of relationship between insurer and agent in providing real estate errors and omissions insurance."

This requirement constituted ten points or 10 per cent of the total score. The length of relationship between insurer and agent in providing real estate errors and omissions insurance is evidence which would suggest the ability to successfully and efficiently handle the Errors and Omissions insurance to be offered under the anticipated contract. The Secretary finds that this best value criterion is rational and not arbitrary or capricious. Accordingly, this ground of protest is without merit.

4. "Level of support criteria for Servicing Agent and Attorneys."

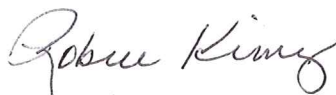
This requirement constituted five points or 5 per cent of the total score. This factor is evidence which would suggest the ability to successfully and efficiently handle the Errors and Omissions insurance to be offered under the anticipated contract. The Secretary finds that this best value criterion is rational and not arbitrary or capricious. Accordingly, this ground of protest is without merit.

Accordingly, upon review of the record, WUG has not demonstrated that the RFB best value criteria were arbitrary, capricious, or contrary to law. The protest, therefore, must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary  
Finance and Administration Cabinet  
By Designation



Robin Kinney  
Executive Director  
Office of Administrative Services

cc: Don Speer, OPS